

the Commission has found that “BellSouth’s performance data [are] reliable.” *Five State Order* ¶ 294. That conclusion is even more correct today than it was less than two months ago, when the Commission issued its *Five State Order*.

In particular, in the *Five State Order*, the Commission relied on the wide variety of internal and external mechanisms that ensured the reliability of BellSouth’s data. These included, in the Commission’s words, “extensive third party auditing, the internal and external data controls, BellSouth’s making available the raw performance data to competing carriers and regulators, BellSouth’s readiness to engage in data reconciliations, and the oversight and review of the data, and of proposed changes to the metrics, provided by state commissions.” *Id.* ¶ 16 (footnotes omitted).

All of these factors are equally, if not more, applicable here. Indeed, the third-party auditing of BellSouth’s data in Florida and Georgia has progressed even further, without finding any systemic problems in the data (in fact, in only four instances are there exceptions involving more than a .5% point difference in results). *See BellSouth Varner Reply Aff.* ¶¶ 56, 66.

The DOJ notes these facts in its Evaluation and expressly concludes that there “has been further progress” -- that is, progress *beyond* the level at which this Commission has already twice found BellSouth’s data to be reliable -- “on issues of concern with respect to BellSouth’s performance measurement.” *DOJ Eval.* at 9. The DOJ particularly highlights both the progress in the Florida and Georgia audits and the fact that BellSouth’s state commission-approved disclosure mechanism for changes in measures “appears to be working as intended.” *Id.* It is also significant that, in stark contrast to prior applications, AT&T now raises no argument that specific metric results are unreliable or incorrect. *See BellSouth Varner Reply Aff.* ¶¶ 3-4.

The DOJ also encourages this Commission to review BellSouth's data reposting policy in order to ensure that this policy does not affect "the accuracy of BellSouth's reported performance data." *DOJ Eval.* at 10. BellSouth welcomes this review. At the outset, it is important to understand that the reposting policy is not the exclusive, or even the primary, mechanism through which BellSouth ensures the accuracy of its data. *See BellSouth Varner Reply Aff.* ¶¶ 5, 11. Rather, the mechanisms that ensure the accuracy of data include, among other things, the ongoing data audits (which will continue even after section 271 approval), BellSouth's data notification policy (which applies to *all* changes that BellSouth makes in its measurements), the continuing performance reviews that state commissions, including the Florida and Georgia PSCs, have undertaken and are undertaking, and the internal and external controls that exist to ensure data accuracy. *See id.* ¶¶ 5-6.

Additionally, and importantly, in addition to these mechanisms, BellSouth has been extremely candid with this Commission and state regulators in disclosing errors or problems that it has discovered in performance data. As this Commission well knows, BellSouth routinely notifies it and other regulators of known data issues, as it has done in this Application and in prior ones. *See id.* ¶ 6. Contrary to the baseless suggestion of AT&T's Ms. Norris, BellSouth has never hidden -- and will not hide -- data errors regardless of its reposting policy. There is no evidence that BellSouth has ever "shrouded" any errors in its data, nor could it do so given the extensive monitoring that occurs. *Compare AT&T Norris Decl.* ¶¶ 8-10. Rather, "BellSouth goes to extraordinary lengths not only to report data that are as accurate as possible, but also to keep CLECs and regulatory agencies informed of any inaccuracies, no matter how minor, that might exist." *BellSouth Varner Reply Aff.* ¶ 6.

BellSouth's reposting policy -- which BellSouth provided to this Commission in the Five State proceeding¹¹ and which this Commission properly understood to be consistent with a finding that BellSouth's data are "reliable" -- must be understood in the context of all these other disclosure mechanisms and checks on data reliability. Reposting is simply *another* mechanism to ensure data accuracy and reliability. BellSouth's reposting policy likely is not even necessary, given the many other disclosure mechanisms that exist. Indeed, BellSouth did not have a written policy on this issue at the time of the *Georgia/Louisiana Order*, and Verizon apparently has reasonably and lawfully chosen generally not to repost data in at least some states where it has obtained section 271 authority.¹² As is apparently the case with Verizon, regardless of whether BellSouth reposts changes, it discloses errors by, among other things, notifying CLECs and state commissions in advance about the need to alter metric calculations and providing consistent disclosures in proceedings such as this one. *See BellSouth Varner Reply Aff.* ¶ 5. Additionally, to ensure that there is no question as to the adequacy of BellSouth's disclosures, starting on December 1, BellSouth will notify state commissions of any validated data issues affecting the calculated measurement results that are not scheduled for a fix. *See id.* ¶ 14.

In any event, BellSouth's reposting policy provides a significant amount of additional disclosure to regulators and CLECs to ensure that any meaningful differences in data are corrected. BellSouth has recently revised its policy so that it covers all SEEMs measures, which

¹¹ Reply Affidavit of Alphonso J. Varner, Exh. PM-13, attached to Reply Comments in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina, *Five State Proceeding*, WC Docket No. 02-150 (filed Aug. 5, 2002).

¹² *See* Joint Reply Declaration of Elaine M. Guerard, Julie A. Canny, and Marilyn C. DeVito ¶ 33, attached to Reply Comments of Verizon Pennsylvania, *Pennsylvania Proceeding*, CC Docket No. 01-138 (filed Aug. 6, 2001) ("Restating performance reports on a routine basis would be administratively burdensome, particularly when many -- if not nearly all -- of the errors are immaterial to the ultimate performance results.").

are those measures that the state commission has deemed critical enough to include in the penalty plan. *See id.* ¶ 23. Moreover, as discussed in detail in Alphonso Varner's reply affidavit, the policy is reasonably designed to address all significant changes in those measures. *See id.* ¶¶ 17-22.

Notably, moreover, this policy is not static and is subject to review by state commissions. BellSouth has filed (or will file) this policy with the Florida, Georgia, and Louisiana PSCs, and CLECs remain free to raise any suggestions that they have as to BellSouth's policy before these and other state commissions. *See id.* ¶ 9. In the meantime, however, there is no basis for the Commission to deviate from its September 2002 conclusion that, because of all the different checks discussed above, BellSouth's data are reliable. Indeed, as noted, BellSouth has now added another check to ensure that all validated data issues affecting results are revealed to state regulators.

The few other issues raised by CLECS can be dismissed quickly and are discussed in full in the reply affidavit of Alphonso Varner. For instance, Network Telephone (at 9) argues that BellSouth fails to provide certain raw data involving excluded records. This claim is meritless. The purpose of providing raw data is to allow CLECs to replicate BellSouth's calculations, and excluded records are not necessary for that purpose. *See BellSouth Varner Reply Aff.* ¶ 26. In any event, CLECs can obtain these data themselves, and BellSouth is taking steps to provide these data in the first quarter of 2003. *See id.* ¶¶ 26-27.

III. AT&T HAS DEMONSTRATED NO CLEAR ERRORS IN THE UNE RATES ESTABLISHED BY THE FLORIDA PSC

Neither the DOJ nor the vast majority of commenters disputes BellSouth's showing that the FPSC and the TRA have established a full set of TELRIC-compliant rates. Indeed, only one commenter -- AT&T -- takes issue with BellSouth's UNE rates, and even it has no complaint

with BellSouth's rates in Tennessee. Rather, AT&T limits its arguments to three issues regarding BellSouth's rates in Florida, one of which (involving recovery for inflation) this Commission has already rejected, another of which (involving a particular hot-cut rate) simply second-guesses a reasonable record-based judgment by the FPSC, and the last of which (involving expedition charges) has never been raised before the FPSC. None of these claims is substantial.

Importantly in this regard, while AT&T disputes the expert judgment of the Florida PSC as to the two issues that AT&T actually raised before that agency, even it does not contest BellSouth's showing that the FPSC undertook extensive and open pricing proceedings, and that the FPSC fully explained its conclusion in hundreds of pages of extraordinarily thorough and detailed analysis in which the FPSC sought to apply this Commission's pricing rules. Given the lack of any disputes on these points, this Commission's precedents establish that the Commission should "place great weight" on the FPSC's determinations that the BellSouth rates at issue here are TELRIC-compliant. *New York Order* ¶ 238.

Indeed, the D.C. Circuit recently reconfirmed the reasonableness of this Commission's deferential review of state commission pricing determinations. As the court explained, because "[a]pplication of the TELRIC standard has proved complex, involving detailed fact-finding over years of litigation in state agencies," this Commission "cannot independently determine the TELRIC compliance of an ILEC's UNE rates." *WorldCom, Inc. v. FCC*, No. 01-1198, 2002 WL 31360443, at *2 (D.C. Cir. Oct. 22, 2002). Rather, the Commission "defers to the determinations of the state agencies who possess a considerable degree of expertise and who typically perform a significant amount of background work." *Id.* (internal quotation marks and brackets omitted). The D.C. Circuit's analysis applies especially strongly here, where, by any

standard, the Florida PSC has been extraordinarily thorough and careful in its analysis of TELRIC issues, and where AT&T is attacking record-based judgments in complex areas.

Accordingly, while AT&T may disagree with the judgment of the FPSC as to the few issues that AT&T has raised here, none of AT&T's claims comes close to overcoming the deferential standard that the Commission should apply here. That is, AT&T has not established that "basic TELRIC principles [have been] violated" or that the FPSC made "clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce." *New York Order* ¶ 244. The Commission should thus conclude here, as it has in BellSouth's applications for its other seven in-region states, that BellSouth's UNE rates are consistent with section 271's requirements.

Alleged Double-Counting of Inflation. AT&T's lead pricing argument has *already* been rejected not only by the Florida PSC, but by this Commission, and AT&T has provided no reason for the Commission to depart from its considered judgment -- and the considered judgment of the FPSC -- on this issue.

AT&T claims that BellSouth "impermissibly double count[s] inflation" by "includ[ing] a provision for inflation in the cost of capital and also us[ing] current asset values that include an inflation factor." *AT&T Comments* at 22; *AT&T Klick/Pitkin Decl.* ¶¶ 4-16. AT&T raised this argument in the Georgia/Louisiana proceeding. There, AT&T Declarant Baranowski argued that BellSouth double-counted inflation in its Louisiana cost studies by accounting for it both in the material price and in the cost of capital.¹³ The Commission recognized that the Louisiana PSC

¹³ Declaration of Michael Baranowski on Behalf of AT&T Corp. ¶ 8, attached to Comments of AT&T Corp. in Opposition to BellSouth Corporation's Section 271 Application for Georgia and Louisiana, *Georgia/Louisiana Proceeding*, CC Docket No. 01-277 (filed Oct. 19, 2001).

had specifically addressed and rejected this claim, and then squarely determined that “commenters have not presented evidence that is sufficient to demonstrate that the Louisiana Commission made clear errors in [its] factual findings.” *GA/LA Order* ¶¶ 62, 64.

The same analysis applies here. AT&T raised its concern about alleged double-counting of inflation before the Florida PSC, and the expert state commission reasonably rejected it. The FPSC noted the testimony of AT&T witness Pitkin, which alleged “that the cost of capital input is a nominal cost of capital and, as such, compensates investors for the effects of inflation.” *FPSC UNE Rate Order* at 299.¹⁴ The FPSC further acknowledged that Mr. Pitkin “alleges that BellSouth is double counting the effects of inflation by applying an inflation factor to material investment in the loop model and by updating unit costs.” *Id.* The FPSC, however, also noted that BellSouth’s witness, Daonne Caldwell, testified that there “are two distinct types of inflation that impact the costs that BellSouth will incur. One type of inflation compensates investors for the use of their funds and the other type captures the increase or decrease in the cost of the plant.” *Id.* Ultimately, the FPSC did not accept AT&T’s argument. *See id.* at 299-304. Additionally, while the FPSC initially prevented BellSouth from recovering for the effects of inflation on the cost of plant (based on a Sprint argument that AT&T does not adopt here), it ultimately granted reconsideration on that issue and accepted BellSouth’s position. *See FPSC Reconsideration Order* at 5-7.¹⁵

¹⁴ Order No. PSC-01-1181-FOF-TP at 299, *Investigation into Pricing of Unbundled Network Elements*, Docket No. 990649-TP (FPSC May 25, 2001) (“*FPSC UNE Rate Order*”) (App. D – FL, Tab 46).

¹⁵ Order No. PSC-01-2051-FOF-TP at 5-7, *Investigation into Pricing of Unbundled Network Elements*, Docket No. 990649-TP (FPSC Oct. 18, 2001) (“*FPSC Reconsideration Order*”) (App. D – FL, Tab 56).

The FPSC's resolution of this issue was appropriate and certainly demonstrates no clear TELRIC error, especially because, as noted, this Commission approved of a directly analogous result in the Georgia/Louisiana proceeding. *See, e.g., Five State Order* ¶ 119 (rejecting pricing argument because it had been made and found unpersuasive in prior section 271 proceeding and had also been reasonably rejected by the relevant state commission). The reasonableness of the FPSC's conclusion is also shown by the fact that its conclusion accords not only with that of the Louisiana PSC, but also with the decisions of all the commissions in BellSouth's region that have been presented with this issue. *See BellSouth Caldwell Reply Aff.* ¶¶ 7-8 (Reply App. Tab C). There is no reason to believe that the unanimous decisions of all these state commissions -- each of which "possess[es] a considerable degree of expertise," *WorldCom*, 2002 WL 31360443, at *2 -- rest on a "basic TELRIC error."

On the contrary, as demonstrated in the attached reply affidavit of Dr. Randall Billingsley, the consistent decisions of these commissions are fully in accord with established principles. Dr. Billingsley demonstrates at length that the Florida PSC's decision accords with sound economics and is consistent with standard economic texts and literature, and that the contrary material cited by AT&T involved the very different circumstance of rate-of-return regulation. *See BellSouth Billingsley Reply Aff.* ¶¶ 4-30 (Reply App. Tab B). Dr. Billingsley's analysis establishes beyond doubt that this Commission has no reason to revisit its prior determination on this issue.

Hot-Cut Rates for Time-Specific SL2 Loop Cutovers. AT&T also challenges what it presents as BellSouth's "hot cut rate" in Florida. *See AT&T Comments* at 23-25; *AT&T King Decl.* ¶¶ 5-13. As an initial matter, the \$160 rate that AT&T contests is *not* the rate for all hot cuts in Florida. Rather, it is the rate for the first hot cut for Service Level 2 ("SL2") loops when

AT&T requests time-specific order coordination. *See BellSouth Caldwell Reply Aff.* ¶ 16. To put this issue in perspective, only 16 of the approximately 4,700 SL1 and SL2 loops that BellSouth provisioned in Florida in August 2002 involved the SL2 conversion with time-specific order coordination that AT&T is challenging here. *BellSouth Ruscilli/Cox Reply Aff.* ¶ 11. CLECs pay much less for other forms of hot cuts that involve less cost to BellSouth. For instance, BellSouth's non-recurring rate in Florida for a Service Level 1 ("SL1") loop without order coordination is \$51.09. *See BellSouth Caldwell Reply Aff.* ¶ 19. AT&T notably does not contest the validity of those other rates, which are also available to it.

In any event, the higher non-recurring rates for SL2 loops, and particularly those with time-specific order coordination, reflect real cost differences that BellSouth incurs and that BellSouth documented in its cost studies filed with the Florida PSC. *See id.* ¶ 17. Indeed, BellSouth's studies supported significantly higher rates (more than \$200), but the FPSC exercised its discretion to modify those rate proposals in a variety of ways that resulted in approximately 40% lower rates. *See id.* ¶ 30.

The reason for the higher cost here is that SL2 loops are designed loops. The non-recurring charges for migrating such loops reflect the additional features that a CLEC receives with such a designed loop. Those features include a full design layout record and the installation of test points. *See id.* ¶ 17. BellSouth also incurs (and charges for) additional labor costs when time-specific order coordination is requested. *See id.* ¶ 22. Significantly, while these SL2 features create additional non-recurring costs, the additional features of these designed loops result in shorter maintenance times, which may be a significant offsetting advantage for CLECs. *See Ex parte* Letter from Glenn T. Reynolds, BellSouth Corp., to Marlene H. Dortch, Secretary, FCC, Attach. (filed Oct. 25, 2002).

AT&T's argument that these charges are not TELRIC-compliant rests largely on its belief that the \$160 rate is higher than that authorized for other BOCs in a few other states. *See AT&T Comments* at 24 ("Comparisons with hot cut charges of other BOCs demonstrate that BellSouth's Florida rate is clearly excessive."). That claim is beside the point, however. "[S]eparate, reasonable applications of TELRIC principles can produce a range of rates. It would be inappropriate . . . to reject an application that relied on rates that reflected a reasonable application of TELRIC principles merely because that application was filed after we had approved a separate application based on rates at a lower point in the TELRIC range." *GA/LA Order* ¶ 25. As the Commission recently stated in evaluating an analogous argument: "BellSouth points out that the Commission has not previously found simple comparisons of non-recurring charges between states to be dispositive of TELRIC compliance. BellSouth is correct." *Five State Order* ¶ 125 (footnote omitted). Indeed, the Commission has previously made this precise point in the context of an AT&T argument about hot-cut rates. *See New Jersey Order* ¶ 70 n.193; *see also BellSouth Ruscilli/Cox Reply Aff.* ¶¶ 10-17.

Additionally, to the extent any comparison is useful here, the relevant comparison is to the hot-cut rates established by other BellSouth states. The rates set by the Florida PSC are in line with those established in other BellSouth states, which confirms that the FPSC's judgments were reasonable ones that are consistent with the rulings of other expert agencies reviewing similar evidence. *See id.* ¶ 10 & Exh. JAR/CKC-2.

Moreover, AT&T's argument that the Florida PSC made a TELRIC error here is based on an extreme and unrealistic set of assumptions that the FPSC reasonably rejected based on the evidence in the record before it. As Daonne Caldwell explains in detail in her attached affidavit, AT&T's argument that hot-cut rates should be lower is grounded in the assumption that

BellSouth could adopt an automated hot-cut system that avoids manual processes that, in the real world, must be employed. *See BellSouth Caldwell Reply Aff.* ¶¶ 24-25. AT&T's witness, Mr. King, did not demonstrate that these automated practices are used anywhere by any incumbent LEC. *See id.*

The Florida PSC reasonably accounted for the record evidence on this point. It stressed that "[i]n his review and critique of BellSouth's cost studies witness King essentially assumed, e.g., the existence of a fully automated ordering system which could identify all errors on an electronically submitted local service request (LSR) and resubmit it to [a CLEC]. However, he subsequently admitted that he was unaware if such a system had actually been implemented anywhere." *FPSC UNE Rate Order* at 332. The FPSC did not believe that such a system was "reasonably achievable," and thus declined to adopt Mr. King's proposals. There is no basis for this Commission to second-guess the FPSC's resolution of that record-based issue as to the appropriate inputs in a cost study.

Expedition Charges. Finally, AT&T raises an additional pricing argument that it has not even bothered to make in a pricing proceeding in Florida. In particular, AT&T contends that BellSouth's charge for expediting orders violates 47 U.S.C. § 252(d). *See AT&T King Decl.* ¶¶ 14-16. AT&T alleges, moreover, that BellSouth has failed to provide cost evidence supporting this rate. *See id.* ¶ 15.

As an initial matter, AT&T does not acknowledge that it *voluntarily* agreed to an interconnection agreement under which (1) BellSouth can charge for expedition and (2) where charges are not specified in the agreement, BellSouth's tariffed rates are to apply. *See BellSouth Ruscilli/Cox Reply Aff.* ¶ 18. Accordingly, instead of arbitrating this issue -- as it had the right to

do if it believed that BellSouth's charges were unlawful -- AT&T freely chose to enter into this agreement.

Given that AT&T in fact agreed to the terms and conditions for expedited order requests, its claim should be disregarded. See 47 U.S.C. § 252(a)(1) (permitting parties to agree to terms "without regard" to the 1996 Act's requirements). Even if the Commission chooses to review the issue, AT&T's arguments merit "little weight," because they were not presented in any state proceeding. *Five State Order* ¶ 32. At most, BellSouth should be required to provide a "reasonable explanation" on this issue. *Id.*

BellSouth's explanation easily passes that test. Although AT&T asserts that the expedition rate is inconsistent with section 252(d), it never addresses the threshold issue of whether section 252(d) even applies here. In fact, it does not. Section 252(d)(1) applies to the "just and reasonable rate for network elements for purposes of [section 251(c)(3)]." 47 U.S.C. § 252(d)(1). Section 251(c)(3), in turn, requires "nondiscriminatory" access to network elements. *Id.* § 251(c)(3). BellSouth provides such nondiscriminatory access through its standard provisioning intervals. Expedition goes beyond nondiscrimination and thus is not covered by section 251(c)(3). See *BellSouth Ruscilli/Cox Reply Aff.* ¶¶ 20-21. Indeed, when this Commission sought to interpret section 251(c)(2) and (3) to mandate that ILECs provide "superior quality" access on request, the Eighth Circuit reversed that determination as inconsistent with the statute. See *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 812-13 (8th Cir. 1997), *aff'd in part, rev'd in part on other grounds sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

Accordingly, it is clear that section 251(c)(3) does not apply to this expedition service, and thus section 252(d)(1) does not apply either. At the very least, BellSouth's understanding of

these statutory provisions provides a “reasonable” basis for the rates at issue here. That is all that is required, because AT&T has wholly failed to raise this issue before the appropriate state authorities.

IV. OTHER ISSUES RAISED BY COMMENTERS DO NOT PROVIDE ANY BASIS TO DENY THIS APPLICATION

A. Loops

As the Commission has now twice concluded, BellSouth has fully complied with its obligations under checklist item 4, *see Five State Order* ¶ 232; *GA/LA Order* ¶ 218, and BellSouth’s strong performance continues to confirm that CLECs have nondiscriminatory access to unbundled loops. While CLECs have raised a few scattered issues, they fail to undercut the comprehensive showing of excellent performance in all aspects of BellSouth’s pre-ordering, ordering, provisioning, and maintenance systems.

This Commission has twice found that BellSouth provides nondiscriminatory access to line-shared loops. *See Five State Order* ¶¶ 248-249; *GA/LA Order* ¶¶ 238-239. Covad (at 25-29) nevertheless argues that BellSouth installs loops far more reliably for its own customers than it does for CLEC customers. None of its arguments supports a finding of checklist noncompliance.

First, Covad complains about BellSouth’s performance with respect to percent provisioning troubles within 30 days. As an initial matter, Covad acknowledges that the small universe of orders in Tennessee does not provide a statistically conclusive comparison with the retail analogue. *See Covad Comments* at 27; *BellSouth Varner Reply Aff.* ¶ 143. In Florida, although there was some disparity, the results show a very high incidence of trouble reports that are “Test OK/Found OK” (or “TOK/FOK”) for Covad. *See id.* Specifically, for the submetric “Percent Provisioning Troubles Within 30 Days/Line Sharing -- Dispatched” (B.2.19.1.1) in

Florida, 39% of the troubles reported were closed as TOK/FOK in May 2002, 23% in June, 50% in July, and 31% in August. *See id.*; *see also Five State Order* ¶ 170 (noting that “‘a significant number’ of . . . trouble reports for specific submetrics were closed without a trouble being found”).

With respect to “Percent Provisioning Troubles Within 30 Days/Line Sharing -- Non-Dispatched” (B.2.19.1.2), there was also a high incidence of reports closed as TOK/FOK in both Florida and Tennessee. *See BellSouth Varner Reply Aff.* ¶ 144. In Tennessee, BellSouth met the performance criteria for May and June 2002, and, if the TOK/FOK reports are removed from the results for July and August 2002, percent troubles in 30 days would have been quite small. *See id.* Similarly, in Florida, if the TOK/FOK reports are removed from the results for May, June, July, and August 2002, the Percent Provisioning Troubles Within 30 Days for Covad would have been 4.6%, 9.6%, 5.4%, and 4.5%, respectively. *See id.*

Second, Covad complains about BellSouth’s performance with respect to maintenance average duration. As an initial matter, Covad’s complaints about BellSouth’s performance in Florida are meritless -- BellSouth met the retail analogue all 4 months between May and August 2002. *See id.* ¶ 147. In Tennessee, while BellSouth missed 3 out of 4 months, the difference in reported results for this submetric was largely due to a very high incidence of trouble reports being closed as TOK/ FOK. *See id.* ¶ 146.

Finally, Covad takes issue with BellSouth’s performance with respect to the “Percent Repeat Troubles Within 30 Days” metric. Again, Covad is incorrect. BellSouth met the retail analogue comparison criteria for all 4 months (May through August 2002) in Tennessee. *See id.* ¶ 148. And, although BellSouth missed the benchmark in Florida in May 2002, it met the benchmark the following 3 months. *See id.*

KMC's arguments (at 16) about BellSouth's loop performance are similarly unpersuasive. KMC claims that CLEC high-capacity and digital loop customers sustain more outages than BellSouth customers. As explained in the reply affidavit of Alphonso Varner (¶ 150), the retail analogue for these circuits includes many interoffice circuits that ride fiber facilities and run between central offices at the DS3 level, which are less complex than the DS1 CLEC circuits that have additional circuit equipment. Moreover, if one looks at the CLEC circuits for dispatch and non-dispatch, 95% of all circuits were trouble-free during the period included with this filing. *See id.* That solid performance hardly provides a basis to find noncompliance.

Finally, AT&T (at 19-20) argues that BellSouth does not provide an adequate process for converting DS1 circuits to UNEs. Similar complaints were raised in the Georgia/Louisiana proceeding, and they did not result in a finding of noncompliance. *See BellSouth Ruscilli/Cox Reply Aff.* ¶ 24. Indeed, although AT&T complains about BellSouth's process, this Commission has specifically concluded, in the context of EELs, that a multiple-step conversion process is not prohibited by the Commission's rules. *See GA/LA Order* ¶ 200. The Commission's decision there accorded with prior Commission precedent on this issue. *See KS/OK Order* ¶ 175. AT&T does not acknowledge, much less distinguish, this precedent. Instead, AT&T cites the *Supplemental Order Clarification*,¹⁶ which (1) applies to combinations, not stand-alone loops, and (2) does not prohibit multiple-order processes even for combinations, as demonstrated by the *GA/LA Order* and the *KS/OK Order*. Nor does AT&T explain with any specificity why BellSouth's process in particular cannot be accomplished in accord with the Commission's

¹⁶ Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 (2000).

standards, or why that process prevents AT&T from having a meaningful opportunity to compete; in addition, BellSouth has proposed a project-managed process to facilitate the replacement of special access service with stand-alone UNEs. *See BellSouth Ruscilli/Cox Reply Aff.* ¶¶ 23-28. AT&T's claim should thus be rejected.

B. Number Portability

AT&T (at 17) claims that BellSouth "refuses to port certain numbers for larger businesses until AT&T has resolved issues concerning BellSouth's relationship with the customer." AT&T's argument does not withstand scrutiny.

To be clear, BellSouth is not refusing to port any numbers, and thus fully satisfies its checklist item 11 requirements. All that BellSouth is doing is ensuring that for certain complex services involving direct inward dialing, when a CLEC requests the porting of all the numbers, it must specify whether its new customer intends to continue to use (and thus pay for) the relevant BellSouth facility. This information is necessary both in order to avoid unnecessary billing to a CLEC customer and to enable BellSouth to deploy network facilities efficiently (by not leaving them idle if the customer is not using them). *See BellSouth Ainsworth Reply Aff.* ¶¶ 22-24.

Again, the core point here is that BellSouth is not refusing to port any numbers. It is simply seeking appropriate information regarding the disposition of facilities as part of the transfer of service to AT&T or another CLEC. Notably, AT&T cites no regulation or Commission order holding that such a reasonable policy is unlawful. It has thus provided no basis to find that BellSouth is not complying with this checklist requirement.

Network Telephone's argument is no more persuasive. Network Telephone (at 8) asserts that it has experienced delays in the porting of numbers and speculates that this problem "may be

resulting from BellSouth's interface" with Neustar, the independent vendor that operates the Number Portability Administration Center ("NPAC").

Network Telephone provides no documentation or specific examples of this problem, nor has any other CLEC raised this issue in this proceeding. There is thus no basis to conclude that this is a significant problem, or that BellSouth bears any responsibility for this issue, whatever its scope. On the contrary, as explained in the reply affidavit of William Stacy, the problem may well involve Network Telephone's interface with Neustar. *See BellSouth Stacy Reply Aff.* ¶ 214. Network Telephone presents no evidence that it contacted Neustar to isolate the problem, or that other CLECs have the same problem. *See id.* ¶ 215. Additionally, it should be noted that Neustar has publicly acknowledged experiencing capacity issues with NPAC, which may also be relevant to Network Telephone's concerns. *See id.*

Network Telephone's unsupported claim, like AT&T's, thus provides no basis for this Commission to depart from its own prior findings (as well as that of both the FPSC and the TRA) that BellSouth meets its number portability obligations.

C. Reciprocal Compensation

KMC (at 5) suggests that BellSouth does not meet its reciprocal compensation obligations because BellSouth allegedly fails to "remit appropriate compensation for the transport and termination of traffic." KMC (at 5-6) alleges that BellSouth owes approximately \$6 million dollars region-wide to KMC under the parties' current interconnection agreement and a predecessor agreement.

KMC's Comments provide no support for its allegation that BellSouth owes KMC money for reciprocal compensation. They do not identify the kinds of traffic at issue; do not explain why, as a matter of law, reciprocal compensation is required for this kind of traffic under 47

U.S.C. § 251(b)(5); do not specify agreement provisions that BellSouth has allegedly violated; and do not provide the Commission with any documentation as to the moneys allegedly owed, the history of the dispute, and the steps that KMC has taken to resolve it.

In sum, KMC's argument amounts to little more than the bald assertion that KMC believes that BellSouth owes KMC money. As this Commission has repeatedly concluded, such unsupported claims provide no basis to conclude that a BOC has failed to meet its checklist obligations. *See Texas Order* ¶ 50 ("Mere unsupported evidence in opposition will not suffice."); *GA/LA Order* ¶ 168 (rejecting CLECs' "arguments [that] are vague and lack supporting evidence in the record"); *id.* ¶ 267 ("Because KMC's claim appears to be anecdotal and unsupported by any persuasive evidence, we conclude that it does not warrant a finding of noncompliance with this checklist item."); *Massachusetts Order* ¶ 73 (finding that "vague assertions [do not] overcome Verizon's specific evidence showing that it provides confirmation notices in a manner that affords competing carriers a meaningful opportunity to compete").

In any event, from BellSouth's research, it appears that this claim relates to certain disputes that BellSouth has had with KMC regarding payment for (1) what BellSouth believes to be double-billing and (2) traffic originated by another carrier, transited through BellSouth's network, and then delivered to KMC. *See BellSouth Ruscilli/Cox Reply Aff.* ¶¶ 31-32. KMC obviously has no right to double-recovery for the same traffic. Similarly, BellSouth's current position on the transit-traffic issue is consistent with industry guidelines, and KMC has not remotely demonstrated that BellSouth has a clear legal obligation in this particular factual context. *See id.* ¶¶ 32-33. Additionally, compensation for that traffic is specifically excluded under the terms of BellSouth's interconnection agreement with KMC. *See id.* ¶ 32. For all these reasons, KMC has not come close to establishing a checklist violation.

Importantly, moreover, BellSouth has (1) paid all non-disputed amounts to KMC and (2) invoked the dispute resolution provisions of its agreement with KMC and is seeking an orderly resolution of this issue. *See id.* ¶ 30. There is no reason that this Commission should disrupt the process that the parties jointly agreed to by seeking to resolve this specific carrier-to-carrier dispute in the course of this section 271 proceeding. On the contrary, the Commission has repeatedly noted that it is commonplace for large commercial entities to have some billing disputes at any point in time. *See Five State Order* ¶ 176. As the Commission has stated, “[t]o the extent that billing disputes arise, carriers are able to address their disputes through the billing dispute resolution process outlined in their interconnection agreements,” *id.* -- which, of course, is precisely what BellSouth is seeking to do here. *See generally Texas Order* ¶ 24 (“[T]he section 271 process simply could not function as Congress intended if we were generally required to resolve all [interpretive] disputes as a precondition to granting a section 271 application.”).

The unsupported allegations of a single carrier do not come close to establishing that BellSouth is not making required reciprocal compensation payments in an appropriate manner, especially in light of the clear findings of both the Florida PSC and the TRA that BellSouth has satisfied its checklist obligations in this regard. *See TRA Advisory Opinion* at 41-42; *FPSC Consultative Opinion* at 185-86. The conclusions of those agencies, moreover, accord with the findings of all the other state commissions in BellSouth’s region, and with this Commission’s own repeated findings that BellSouth has satisfied this checklist requirement. The Commission should reiterate that finding here.

D. Section 272

AT&T (at 30-37) recycles its claim that certain switched access tariffs that BellSouth created to accommodate the needs of independent interexchange carriers in fact provide unlawfully discriminatory benefits to BSLD. This Commission rejected that same argument in the *Five State Order* because BSLD was not eligible to take service under any of the relevant tariffs. As the Commission explained, “BellSouth contends that there is no section 272 violation because BellSouth Long Distance is not eligible to take service under the tariffs at issue. We agree.” *Five State Order* ¶ 274 (footnote omitted).

The same analysis applies here. Although AT&T (at 36) speculates that “[w]ith the passage of time” BSLD may now be eligible for the federal tariff or the ones in Florida and Tennessee, that is not the case. BSLD is not eligible for any of these tariffs, and in fact the tariffs in Tennessee are not effective. *See BellSouth Ruscilli/Cox Reply Aff.* ¶¶ 64, 69-70 & Exh. JAR/CKC-5. Accordingly, under the *Five State Order*, there is no issue here. Indeed, AT&T recently told the Commission that its position on this issue is “consistent” with its position in the Five State proceeding, *see Ex Parte* Letter from Jodi S. Sirotinak, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-307 (filed Oct. 29, 2002), and that position should be rejected for the same reasons enunciated in the *Five State Order*.

E. Public Interest and Other Issues

BellSouth demonstrated in its Application that there is abundant evidence that BOC entry into long-distance markets spurs both local and long-distance competition. *See Application* at 115-17.

No commenter challenges the overwhelming evidence on that point. Instead, a few CLECs raise issues that have been resolved in prior proceedings or that lack merit. None of

these claims establishes that the public would benefit by being deprived of BellSouth's long-distance entry in Florida and Tennessee. Indeed, a well-respected non-profit consumer group has concluded that consumers can expect to save as much as \$589 million on local and long-distance service in the first year after BellSouth obtains relief in Florida.¹⁷ Similar benefits can be expected in Tennessee. The Commission should not deny the public these extensive benefits.

BSLD Provision of Service to Unaffiliated Carriers. Network Telephone (at 3-6) argues that BSLD has "refused" to "provide service to CLEC customers," and that it has failed to provide Network Telephone with a draft operational agreement. As BellSouth explained in the Five State proceeding -- where this Commission did "not find that BellSouth's current policy violates the public interest standard of section 271," *Five State Order* ¶ 298 -- BSLD does not refuse to provide service to CLEC customers. *See BellSouth Dennis Reply Aff.* ¶ 3 (Reply App. Tab D). On the contrary, it "stands ready to complete the[] business and technical arrangements . . . to provide service to CLECs' end users." *Id.*

When CLECs first contacted BSLD about providing long distance to CLEC end users (after BellSouth gained long-distance approval in Georgia and Louisiana), BSLD requested that CLECs fill out a questionnaire modeled after the ones used by other IXC's. *See id.* ¶ 8. BSLD asked Network Telephone to fill out this questionnaire on July 18, 2002. *Id.* ¶ 10. Network Telephone has yet to return the questionnaire. *See id.* Nevertheless, on October 9, 2002, BSLD contacted Network Telephone and advised it that it was ready to provide service to Network Telephone's customers subject to Network Telephone's review of and concurrence with BSLD's operating procedures and completion of a simplified version of the questionnaire previously

¹⁷ Telecommunications Research & Action Center, *Projected Residential Consumer Telephone Savings 2* (Sept. 6, 2001), at <http://trac.policy.net/relatives/17340.pdf>.

provided. *See id.* ¶ 11. On October 10, 2002, BSLD provided to Network Telephone a copy of its operating procedures for resale/UNE-switching-based CLECs, including the simplified questionnaire and Acknowledgement Form. *See id.* BSLD requested that Network Telephone complete the questionnaire and Acknowledgement Form and return these items to BSLD. *See id.* On October 11, 2002, and again on October 22, 2002, BSLD contacted Network Telephone to confirm that the items had been received and to offer its availability to respond to any questions. *See id.* Network Telephone has not raised any questions or concerns with the items provided to it on October 10, 2002, and BSLD still awaits Network Telephone's return of the requested information. *See id.* Nonetheless, BSLD has scheduled a conference call with Network Telephone for November 1, 2002, to respond to any questions or concerns it may have. *See id.*

In sum, the evidence here shows that, as at the time of the *Five State Order*, BSLD is not refusing to offer its services to CLEC customers, but rather is working with CLECs, including Network Telephone, to establish operational and business arrangements that would allow BSLD to provide this service. Accordingly, there is no reason for this Commission to depart from its conclusion in the *Five State Order* that BSLD's actions do not violate the public interest standard.

Provision of DSL Over UNE-P Lines. Network Telephone (at 7) also fleetingly argues that BellSouth is improperly "tying" its DSL-based high-speed Internet access service to BellSouth local exchange service. This Commission has repeatedly reviewed this same BellSouth policy and determined that it creates no barrier to checklist compliance. *See GA/LA Order* ¶ 157; *Five State Order* ¶ 164. Indeed, the Commission has specifically rejected the notion that this policy is in any way "discriminatory." *GA/LA Order* ¶ 157.

Network Telephone's brief reference to antitrust tying theory does not change the analysis. Network Telephone's bald, unsupported assertions do not begin to make out a case that BellSouth is engaged in improper tying. *Cf. Five State Order* ¶ 281 (emphasizing that "the factual information necessary to conduct a price squeeze analysis is highly complex"). Network Telephone's claim can be rejected for that reason alone. In any event, Network Telephone's argument fails on the merits. The alleged "tying product" here is DSL-based Internet access, as to which BellSouth plainly lacks market power, much less the "*significant*" market power that is a necessary, but not sufficient, condition to make out a tying claim. *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 796 (1st Cir. 1988) ("'market power' . . . means *significant* market power") (Breyer, J.); *see* 10 Phillip E. Areeda, *et al.*, *Antitrust Law* § 1736e, at 88 (1996). As both this Commission and the D.C. Circuit have repeatedly stressed, there is "robust competition" in the broadband markets, and it is cable, not DSL, that is "dominan[t]," thus precluding the conclusion that BellSouth has the kind of extraordinary market power that is one prerequisite for this sort of claim. *USTA v. FCC*, 290 F.3d 415, 428-29 (D.C. Cir. 2002) (citing Commission findings); *BellSouth Ruscilli/Cox Reply Aff.* ¶¶ 47-49.¹⁸

Sprint Claims. Sprint argues that approving BellSouth's Application is not in the public interest because the substantial and growing competition in Florida and Tennessee is somehow insufficient. But the Commission has repeatedly rejected this very claim. *See, e.g., GA/LA Order* ¶ 282; *Pennsylvania Order* ¶ 126; *Vermont Order* ¶ 63; *Maine Order* ¶ 59. The

¹⁸ Network Telephone's brief reference to BellSouth's dealings with BellSouth Advertising and Publishing ("BAPCO") is also unpersuasive. BellSouth does not have a "Select Points Promotion" in Tennessee at this time, and the program in Florida limits redemptions to nonregulated services. *See BellSouth Ruscilli/Cox Reply Aff.* ¶ 51. Additionally, the test program where BellSouth uses BAPCO as a sales agent has not been implemented in Florida or Tennessee, and in any event only gives customers the option of receiving discounts on BAPCO services. *See id.* ¶ 52.

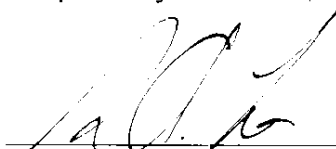
Commission also has repeatedly rejected Sprint's claim that BellSouth's Application should be denied because of the supposed "crisis" in the CLEC industry and the alleged failure of Bell companies to compete with each other. *See, e.g., Rhode Island Order* ¶ 106; *Vermont Order* ¶ 64; *New Jersey Order* ¶ 168 & n.516.

Supra Issues. Supra (at 21) has alleged that BellSouth violates CPNI requirements. As described in the reply affidavit of John Ruscilli/Cynthia Cox (¶¶ 59-61), that allegation is baseless. BellSouth has policies in place to limit CPNI disclosure in accordance with 47 U.S.C. § 222, and otherwise to prevent improper use of information. The Ruscilli/Cox reply affidavit also addresses several other Supra claims and demonstrates that the issues raised by Supra are unique to its particular circumstances, which involve the failure to pay at least \$70 million that it owes BellSouth. Issues relating to Supra are being resolved in a variety of other forums, and this proceeding is not an appropriate one in which to attempt to resolve them. *See BellSouth Ruscilli/Cox Reply Aff.* ¶¶ 5-9.

CONCLUSION

This Application should be granted.

Respectfully submitted,



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Reply Appendix Volume 2 Tabs G-H

Reply Appendix Volume 3 Tab I